IMPLIED-IN-FACT CONTRACTS AND MUTUAL ASSENT

IN a very discerning and helpful article, Professor Williston has illuminated the topic of mutual assent in contracts.[1] His thesis that, in the case of express contracts, mutual assent is something which, in the United States at least, has come to be ascertained by the application of an objective rather than a subjective test is accepted here as conclusively demonstrated, and an attempt will be made merely to pursue a little further his suggestion that it is not desirable to separate from the law of contracts and group under the head of quasi-contracts all those obligations which do not meet the subjective meeting of minds test. As he points out, both contracts and quasi-contracts are obligations imposed by law.

"On no view can any liability be imposed in any other way. To distinguish into two categories obligations imposed by law in accordance with the mental assent of the parties, and obligations imposed by law in accordance with the natural meaning of the acts of the parties but without mental assent, is undesirable unless the law attaches consequences to one category which it does not attach to the other."[2]

Assuming that statement to be fundamentally sound, how are we to discriminate those contracts where the subjective test of a meeting of minds — a harmonious and full mental accord — does not exist from what we know as quasi-contracts? The answer to that question necessitates a consideration of what the courts actually do in enforcing contracts and quasi-contracts, regardless of what they think they are doing.

The first thing that strikes an observer of court action in the two fields of contracts and of quasi-contracts concerns the law of damages. The accepted normal measure of damages in quasi-contracts is the amount of the unjust enrichment of defendant at the plaintiff's expense, while in the law of contracts it is the damage to plaintiff, within the restrictions set by proximate cause, the rule of *Hadley*

[1] Williston, "Mutual Assent in the Formation of Contracts," 14 ILL. L. REV. 85; *Id.*, WIGMORE CELEBRATION LEGAL ESSAYS, 525.

[2] *Id.*, 14 ILL. L. REV. 95; *Id.*, WIGMORE CELEBRATION LEGAL ESSAYS, 535.

v. *Baxendale, etc.*, and regardless of whether defendant gains or loses by the breach.[3] Wherever, therefore, the courts apply the contract rather than the quasi-contract measure of damages and objective tests of the existence of a contract are accepted, the courts necessarily assert that they are dealing with a contract rather than a quasi-contract. If the contract measure is proper, then it is a contract that is enforced even though the court may consider it a quasi-contract.

Professor Williston attempts to demonstrate in the above-mentioned article that dissimilarities between the attitude of equity and that of the common-law courts in cases where the subjective test of a contract is not met can be accounted for, as far as reformation and rescission of contracts are concerned, without drawing the conclusion that equity affirms that the subjective test should determine the existence of contracts. No doubt, those who are imbued with the idea of various regions of conflict between law and equity will be inclined to insist that he fails to make such a demonstration; but one who looks upon equitable waste, to take perhaps the most extreme case, as not conflicting with legal waste but as evidencing merely the chancellor's reaction against unconscionable conduct permitted by the law's inadequacy, will be quite satisfied that in granting reformation and rescission, as well as in denying specific performance, in cases where sufficient surprise and hardship result from the lack of satisfaction of the subjective test requirement, the chancellor is not denying the general soundness of the objective test applied by the law judges but is controlling the application of that test, and bringing it more nearly in accord with the subjective test, in order to prevent clearly unjust results. It is of course not to be denied that some chancellors have been, and that some still

[3] It will be noticed that the "normal measure of damages" is mentioned. That is because some writers class as quasi-contractual some obligations to which a different measure from the normal is applied. As will be seen later, sometimes the contractual measure is applied to alleged quasi-contracts. It is a thesis of this article that such an application, if proper, is a complete demonstration that such alleged quasi-contracts are really some kind of contracts. For quasi-contracts a very definite measure of damages exists:

"Where, however, the recovery is based not upon a real, though unexpressed contract, but upon an unjust unrichment of the defendant; that is, where the cause of action is in quasi-contract, the amount of recovery should strictly be limited to the unjust enrichment conferred upon the defendant by the plaintiff's labor." Beale, "The Measure of Recovery upon Implied and Quasi-Contracts," 19 YALE L. J. 609, 620.

are, consciously applying the subjective test of a meeting of minds, but it seems clear that the decisions which they hand down do not require that exclusive test for their support. A chancellor who adopts the objective test of a meeting of expressions as in general satisfactory will almost always decide the same way that a chancellor applying the subjective test does. Even an objective test judge, whether a chancellor or a common-law judge, must concede that the perfect contract is one which meets the subjective test as well as the objective and must deprecate too great divergence from the subjective.[4] However that may be, the giving or withholding of equitable relief seems to be of practically no assistance to us on the vexed problem of what border-line obligations are properly to be denominated contractual and what quasi-contractual. Rather, it is the law of damages that casts the first satisfactory light on that troublesome question. It seems incontrovertible, and cannot be too often emphasized, that if the normal contractual measure of damages is properly applied to the recovery on an obligation, it is a contract that is enforced; if the normal quasi-contract measure of damages is properly applied, then it is a quasi-contract that is the basis of action.[5]

---

[4] Accordingly, we have rescission at law in some cases where expressions meet but intentions do not. See WILLISTON ON SALES, § 656. On snapped-up offers from the law court's point of view see Hudson Structural Steel Co. *v.* Smith & Rumery Co., 110 Me. 123, 85 Atl. 384 (1912), where there was rescission at law with a *quantum meruit* recovery. In rare instances we have even the equivalent at law of reformation in equity: "The power of equity to reform contracts has been to some extent usurped by courts of law, in fact, though not in name; for the result attained by a court of equity may frequently be reached by a court of law by simply admitting evidence of the actual intention of the parties and enforcing the bargain which the parties intended to make." WILLISTON ON SALES, § 655. Chancellors and law judges, with variations, apply both objective and subjective tests. As Professor Williston has pointed out at the end of the article above mentioned: "Equity may indeed grant relief in certain cases from a contract to one who apparently assented thereto without actual mental assent, and may deny the adverse party a remedy for the enforcement of the contract though the acts of the parties indicated assent, but equity will not do this universally in such cases; and, therefore, to form a separate category of all cases of expressed or apparent mutual assent when there was no mutual mental assent is as misleading in equity as at law." 14 ILL. L. REV. 95; *Id.*, WIGMORE CELEBRATION LEGAL ESSAYS, 535. There is no doubt a difference in degree in the attitude of chancellors and that of law judges toward the subjective and the objective tests, but that difference is not so great as to make chancellors apply only the subjective test.

[5] Here it may be noted that the recent attempt, evidenced in WOODWARD'S QUASI-CONTRACTS, pp. 1–2, to push out of quasi-contracts and into judgments, carriers, etc.,

Among contracts which do not meet the subjective test but do meet the objective, Professor Williston mentions those where there is negligent expression of assent (as where a writing is signed or accepted without examination), those made through interpreters who misinterpret, or through telephone operators who fail to repeat messages properly, those where the telegraph company transmits the offer inaccurately, those where there is satisfaction of an unliquidated claim because the creditor, though refusing to treat a check sent by the debtor for acceptance in satisfaction as satisfying the claim, nevertheless cashes the check, and those where in taking from a store an article the price of which he has inquired, the buyer says, "I decline to pay the price you ask, but will take it at its fair value." The last two instances, like cash sales, may not be cases of contract at all, possibly being satisfaction without accord or sale without contract and so having no juristic significance except as protests against lawlessness, though, as is true of cash sales and of satisfactions of debts, they normally fall in the broader field of agreement. Then, too, all courts would not agree in the solution of the various instances mentioned by Professor Williston. Indeed, practically all of the instances given by him of objective but not subjective test contracts are denied by influential courts to be cases of contracts or other enforceable obligations. Like the cases which hold that an offer of reward made by a private person may be accepted and the reward recovered by one who does the act specified in ignorance that the offer has been made,[6] they fail to receive universal approval.[7] Nevertheless, in the jurisdictions where these several situations are held to give rise to contracts, they necessarily give rise to contracts which fail to satisfy

---

various obligations which Professor Ames, for instance, deemed quasi-contractual, must find its justification primarily in the difference between the rules for measuring damages applicable to those obligations and the ordinary quasi-contract damages rule.

[6] For some cases so holding see Eagle *v.* Smith, 4 Houst. (Del.) 293 (1871); Dawkins *v.* Sappington, 26 Ind. 199 (1866); Sullivan *v.* Phillips, 178 Ind. 164, 98 N. E. 868 (1912); Russell *v.* Stewart, 44 Vt. 170 (1872). See Gibbons *v.* Proctor, 64 L.T. (N. S.) 594 (1891). For offers of reward under a public statute deemed accepted under such circumstances, see Auditor *v.* Ballard, 9 Buch. (Ky.) 572 (1873); Mosley *v.* Stone, 108 Ky. 492, 56 S. W. 965 (1900); Smith *v.* State, 38 Nev. 477, 151 Pac. 512 (1915); Board *v.* Davis, 162 Ind. 60, 69 N. E. 680 (1904).

[7] The weight of authority is probably against the cases in note 6. See 1 ELLIOTT ON CONTRACTS, 64.

the subjective test.[8] Moreover, there is one situation universally accepted where only by the objective test is there a contract. Cases where an offer was made by mail to be accepted by the mailing of a letter of acceptance and where, before the letter of acceptance was mailed, the offeror frantically but ineffectually sent letters of revocation of the offer which, however, did not reach the offeree until after the acceptance was mailed, are recognized everywhere as genuine contracts, but are such by the objective test alone. They fail utterly to meet the subjective test, being express contracts where the minds of the parties do not meet. While contracts where the minds of the parties do not meet are numerically few in number, as compared with that great body of contracts where both minds and expressions meet, they deserve a special name. It remains for somebody to suggest a satisfactory one.[9] For the purpose of this article it will serve to refer to contracts as consisting of (1) meeting-of-the-minds contracts and (2) no-meeting-of-the-minds contracts. There are express contracts of both kinds.[10]

[8] Cases where a principal is held bound by contracts which are within the so-called apparent scope of the agent's authority, but which the principal in fact forbade the agent to make, should probably be mentioned here. It is not meant to controvert Professor Mechem's thesis that by apparent scope of authority must be meant either (1) incidental and usual powers "which, it is presumed, attach to the express authority, unless the principal has made known a contrary intention (these, however, as has been pointed out, are not simply apparent; they are objectively real until the contrary has been made known);" or (2) estoppel of the principal. MECHEM ON AGENCY, 2 ed., § 721. All that is meant is to suggest that an objective rather than a subjective test is applied, as, in general, is true in the case of other contracts by estoppel, and, also, in the case of contracts where the so-called offeror acts by way of joke but the offeree reasonably accepts in earnest.

[9] It was at one time the hope of the writer of this article that we could borrow terms from the civil law and could unite in calling those contracts which meet the subjective test consensual contracts, and those which do not meet the subjective test, but do meet the objective, constructive contracts. See article on "Constructive Contracts," 19 GREEN BAG, 512. But the continued insistence of the English writers upon constructive contracts as the proper name for what we call quasi-contracts and the fact that the phrase "constructive trust" is applied to equitable obligations akin to quasi-contracts, has made that hope grow faint. In order to keep the facts which are to be observed from being lost sight of in a possible dispute as to names, an attempt is made in this article to get along without a resort to distinctive names, even though the attempt necessitates the use of cumbersome phrases.

[10] It should be noted that this differentiation of names in no way violates the position taken by Professor Williston as to categories in the sentences quoted on the first page of this article, for what he was opposing there was labeling express merely-objective-test contracts quasi-contracts. There can be not the least objection to an orderly arrangement and classification of contractual obligations, as such.

But why talk about such distinctions with reference to express contracts alone? Do we not have a similar situation with reference to implied-in-fact contracts? It would seem so, but the conclusion is not so clear because of the very nature of implied-in-fact contracts. Subjective and objective tests are much more difficult to apply to silent doers than to those who speak or write offers and acceptances. Nevertheless, something may be done, but, before that something is undertaken, a start must be made toward the differentiation of implied-in-fact contracts from quasi-contracts. In view of what we have concluded about express no-meeting-of-the-minds, *i. e.* merely objective test, contracts, we naturally turn to the law of damages for help. If in a given situation of conduct where there is no express contract we find the courts enforcing an obligation and applying the contract measure of damage rather than the quasi-contract measure, then we must say that they really find and enforce a contract implied-in-fact. Moreover, we must not be surprised if we find, as was the case with express contracts, that there are meeting-of-the-minds implied-in-fact contracts and no-meeting-of-the-minds implied-in-fact contracts.

When it is said, for instance, that "nothing is plainer than the proposition that the distinction between express and implied contracts lies not in the nature of the undertaking, but in the mode of proof," [11] the implied contracts meant are the meeting-of-the-minds implied-in-fact contracts, sometimes called "tacit" or "inferred" contracts.[12] Examples of these may even be found

[11] Somerville, J., in City Council of Montgomery *v.* Montgomery Water Works Co., 77 Ala. 248, 254 (1884).

[12] "A contract is said to be inferred where the intention of the parties is not expressed in words, but may be gathered from their acts and from surrounding circumstances. In these cases, the law enforces what it deems to have been the intention of the parties." ADDISON'S LAW OF CONTRACTS, 11 ed., 447.

In Smith *v.* Moynihan, 44 Cal. 53, 62–63 (1872), Wallace, C. J., said: "In general an implied contract, in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being in the mere mode of proof by which they are to be respectively established. The law will imply that a party did make such a stipulation as under the circumstances disclosed he ought, upon the principles of honesty, justice, and fairness, to have made. Of course all the circumstances actually surrounding the parties in the particular transactions are to be carefully considered before this implication of a promise is to be indulged."

In Woods *v.* Ayres, 39 Mich. 345, 350–351 (1878), Graves, J., said: "Neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the

among situations treated by some writers as quasi-contractual. Take, for instance, the question whether recovery may be had for services performed by one member of a household for another.

---

mode of substantiation and not in the nature of the thing itself [citations]. To constitute either the one or the other the parties must occupy towards each other a contract status and there must be that connection, mutuality of will and interaction of parties, generally expressed though not very clearly by the term 'privity.' Without this a contract by implication is quite impossible. . . .

"The parties must be consenting bargainers personally or by delegation, and their coming together in contract relation must be manifested by some intelligible conduct, act or sign. If not, no contract is shown [citations]. The privity essential to a contract must proceed from the will of the parties. There may be a privity by operation of law where no privity of contract exists."

In People *v.* Dummer, 274 Ill. 637, 640–641, 113 N. E. 934 (1916), Cartwright, J., said: "A contract may be implied where an agreement in fact is presumed from the acts of the parties, and this is the proper meaning of an implied contract. An illustration of such a contract is where one performs services for another under circumstances showing that they were not intended to be gratuitous and the services are accepted."

In Ramsden & Carr *v.* Chessum & Sons, 110 L. T. 274 (1913), Lord Chancellor Haldane said: "If A. brings goods to B. to be used in work which B. is doing, and B. knows that A. has brought them, not as a gift but as expecting to be paid for them, and B. uses these goods in his work, then *primâ facie* B. is liable to pay the price of the goods."

In Wojahn *v.* National Union Bank, 144 Wis. 646, 667, 129 N. W. 1068 (1911), Marshall, J., said: "The general rule is that if a person performs valuable services for another at that other's request, the law implies, as matter of fact, the making of a promise by the latter and acceptance thereof by the former to pay the one performing the service the reasonable value thereof [citations]. If one merely accepts services from another which are valuable to him, in general, the presumption of fact arises that a compensation equivalent is to pass between the parties, and the burden of proof is upon the recipient of the service to rebut such presumption if he would escape from rendering such equivalent. The burden may be much more easily lifted in such a case than in the case of there being a request for the performance. . . ."

Professor Corbin has suggested that this true meeting-of-the-minds implied-in-fact contract is really one form of express contract. He says: "A contract implied in fact is a true contract based upon a real agreement of the parties. It differs from an express contract only in the evidence necessary to establish its existence and its terms. In reality a contract implied in fact is an express contract, for intentions can be *expressed* as clearly by actions as by words." Corbin, "Quasi-Contractual Obligations," 21 YALE L. J., 533, 546–547. No doubt that is a possible way of looking at them, but it is also possible to emphasize their inferred-as-a-fact nature, as the courts have done. The situation, therefore, is not like that which existed when the courts were pronouncing the non-contractual obligations now known as quasi-contracts to be contracts implied in law and when the courts were, accordingly, demonstrably in error. Instead of dealing with a truth having only one aspect, as was the case in that instance, we have here a double-aspect truth. In a sense the inferred as a fact or tacit contract is expressed by conduct, but in a sense also it is implied-in-fact. It would seem to be hopeless, therefore, to attempt to get rid of the term implied-in-fact as applied to these true contracts enforced because of conduct expressions.

Recovery is usually denied because of a presumption of an intention by one party to give the services or of a lack of intention by the other to pay for them. That is a factual presumption or demonstration. If recovery is allowed, it is always on the basis of a contract measure of damages, namely, the reasonable value of the plaintiff's services, and not of the quasi-contract measure of the actual enrichment of defendant, — usually, of course, there is no difference between the two measures, — and it is allowed because of a demonstration of an express contract of employment or of an inferred-as-a-fact contract, the latter being found sometimes from a presumption of intention to charge and to pay, and sometimes from various circumstances of the household arrangements making it reasonable to find a contractual intent.[13]

But there is another kind of implied-in-fact contract, or of implied-in-fact part of a contract, as the measure of damages applied to that kind shows. Take, for instance, the case of implied warranties. It is submitted that despite the consensus of opinion to the contrary, they are in nature implied-in-fact, whether they be regarded as parts of the express contract or as having a separate existence.[14] It often happens that the business experience and legal information of the parties is such that they know that their bargain will give rise to an implied warranty, in which case the implied warranty is clearly a meeting-of-the-minds implied-in-fact contract, but it also often happens that such is not the case. Where it is not, the courts will not permit the defendant to show that he never thought of himself as warranting; indeed, nothing short of an express assumption of risk by the plaintiff, or an express refusal of defendant to warrant, will contradict the implied warranty by the defendant.[15] If, then, in the last-mentioned situa-

[13] See, for instance, *In re* Pauly's Estate, 174 Ia. 122, 156 N. W. 355 (1916); Morton *v.* Rainey, 82 Ill. 215 (1876) (*cf.* Heffron *v.* Brown, 155 Ill. 322, 40 N. E. 583 (1895); Covey *v.* Rogers, 85 Vt. 308, 81 Atl. 1130 (1912); Estate of Rohrer, 160 Cal. 574, 117 Pac. 172 (1911). For a clear statement of the rule, see Disbrow *v.* Durand, 54 N. J. L. 343, 24 Atl. 545 (1892).

[14] See article on "Change of Position as a Defense in Quasi-Contracts — The Relation of Implied Warranty and Agency to Quasi-Contracts," 20 HARV. L. REV. 205.

[15] "There are implied contracts in the strict sense of the term. . . . Such a contract requires, the same as an express contract, the element of mutual meeting of minds and of intention to contract. The two species differ only in methods of proof. One is established by proof of expression of intention, the other by proof of circumstances from which the intention is implied as matter of fact. The implication arises upon

tion the implied warranty is an implied-in-fact contract, it is a no-meeting-of-the-minds implied-in-fact contract. That it is such a contract rather than a quasi-contract, seems to be shown by the fact that a quasi-contract unjust enrichment measure of damages for its breach is not applied, but instead the very measure of damages which would have been applied if it had been an express warranty is applied. The courts, to be sure, constantly speak of an implied warranty as an obligation implied-in-law rather than as one implied-in-fact, but the explanation of that attitude of the courts is simple. Like perhaps most law teachers, the courts do not yet realize that there are these no-meeting-of-minds implied-in-fact contracts, but that such contracts exist would seem to be proven by the measure of damages applied. They are contracts which are implied-in-fact by the courts for the reason that if the parties had thought about the matter, presumably, in view of general business experience and legal rules, they would have made an express contract to the same effect.[16] Implied war-

legal principles and is conclusive in the absence of something efficiently displacing it, as a presumption of law. Unlike the latter, it being an implication of fact though springing into existence as matter of law, it is rebuttable." Marshall, J., in Wojahn *v.* National Union Bank, 144 Wis. 646, 666–667, 129 N. W. 1068, 1077 (1911).

[16] "It not unfrequently happens, however, that in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and, consequently, where no intention has been expressed by them, or can be inferred from their acts. In such cases the law prescribes their respective rights and liabilities according to the dictates of justice — that is, of general expediency — and according to what it is presumed their intention would have been, had they had these circumstances in their consideration when they made the contract." ADDISON'S LAW OF CONTRACTS, 11 ed., 447, seemingly referring to such contracts as "implied contracts properly so called." It is probable that in this language, which seemingly expresses what is urged above as constituting a no-meeting-of-the-minds implied-in-fact contract. the author quoted was simply describing so-called conditions implied-in-law in contracts. The interesting controversy as to the nature of such conditions — see COSTIGAN, THE PERFORMANCE OF CONTRACTS, 8, note — has only a remote bearing on the problem here considered. While it is acknowledged, as indeed Professor Gray's clear statement of the matter requires (GRAY, THE NATURE AND SOURCES OF THE LAW, § 702), that "construction" is a word which covers both (1) the ascertainment of what the parties actually intended by their writings and (2) the deduction of what they would have intended if they had thought of the matter which has arisen, and so must be held to have provided for, if they used language broad enough to include that probable intention, and while, accordingly, it is admitted that in that second sense of the word "construction" conditions implied-in-law in contracts may be said to be found by construction, the primary meaning of construction, and the general meaning of those who say that conditions implied-in-law are found by construction (witness HARRIMAN ON CONTRACTS, 2 ed., § 315), is that at the time the contract was made the parties

ranties are founded upon the implied facts of general business experience and understanding — implied because people in general, and not necessarily the particular parties concerned, when acting understandingly and fairly, normally agree upon such an assumed factual basis — and the difficulty of statement which results in calling them implied by law comes from the fact that in a given case the minds of the parties may not have met on the point, and from the further fact that the judges infer the business understanding and make the implied warranty rule without leaving the implication to be made in each case by the jury. As they are dealt with, from the damages as well as from the pleading point of view, in the same way as express warranties, they are clearly contracts rather than quasi-contracts and, since they cannot be regarded as express contracts, must fall under the heading of implied-in-fact contracts until we can get a better contract nomenclature.[17]

Once it is admitted that there are some no-meeting-of-the-minds, *i. e.* merely objective test, implied-in-fact contracts, a most interesting series of problems arises. For instances, may there be such a no-meeting-of-the-minds implied-in-fact contract, or a meeting-of-the-minds implied-in-fact contract, where the parties endeavor to

---

actually thought about the matter to be decided. To avoid the false conclusion that the parties did think about what they really did not, it seems proper to deny that conditions implied-by-law are arrived at by construction. There is construction, of course, but what is done is done not necessarily because the parties intended it to be done but despite the fact that they never thought about it. It may be asked, Why be so insistent to keep these ought-to-be conditions from being covered by the word "construction" and yet be so willing to include ought-to-be implied-in-fact contracts under the heading of genuine contracts? Practical consequences furnish the answer in both cases. It may not involve erroneous consequences in the case of wills, for instance, to call two very different things construction. As to that, no opinion is here expressed. But it does involve such erroneous consequences in the case of contracts, — intention conditions must be clearly marked off from what are called conditions implied by law but are really equitable defenses, — so there a discrimination must be made. It does not involve erroneous consequences to include both meeting-of-the-minds implied-in-fact contracts and no-meeting-of-the-minds implied-in-fact contracts under the heading of genuine contracts, and the measure of damages applied to both calls for such inclusion

[17] Implied warranties have their tort aspect as well as their contract. That is another reason for confusion in regard to them. See WILLISTON ON SALES, § 197. In view of his article mentioned in note 1, *supra*, Professor Williston would doubtless to-day change somewhat his statement in that section of the nature of implied warranties when looked at from the contracts point of view. The courts *feel*, even if they do not *say*, that implied warranties are actual contracts, as, again, the measure of damages applied proves, yet often such warranties meet only the objective test.

enter into an express contract but, because of some essential error, do not succeed and yet, thinking that they have a contract, proceed with performance until they find that the express contract does not exist? At first sight, logic seems to say that if there is an attempt to get an express contract and that fails, there can be no implied-in-fact contract — implication perhaps not being reasonable where what the parties were attempting is demonstrated — but such logic negatives at the most only a meeting-of-minds implied-in-fact contract, and may not be persuasive even to that extent. If there is no meeting of minds on the express contract there would seem to be none on an implied-in-fact contract as to the whole of the matter which the express contract was to cover; but that is no reason for saying that there is not a meeting-of-the-minds implied-in-fact contract as to part of that matter, or even that there is not a no-meeting-of-the-minds implied-in-fact contract as to all, if it seems fair to have either. Take, for instance, the most interesting Massachusetts case of *Vickery* v. *Ritchie*.[18] In that case Knowlton, C. J., stated the facts as follows:

"This is an action to recover a balance of $10,467.16, alleged to be due the plaintiff as a contractor, for the construction of a Turkish bath house on land of the defendant. The parties signed duplicate contracts in writing, covering the work. At the time when the plaintiff signed both copies of the contract the defendant's signature was attached, and the contract price therein named was $33,721. When the defendant signed them the contract price stated in each was $23,200. . . . The contracts were on typewritten sheets, and it is supposed that the architect accomplished the fraud by changing the sheets on which the price was written before the signing by the plaintiff, and before the delivery to the defendant. The parties did not discover the discrepancy between the two writings until after the building was substantially completed. Each of them acted honestly and in good faith, trusting the statements of the architect. . . .

"The auditor found that the market value of the labor and materials furnished by the plaintiff, not including the customary charge for the supervision of the work, was $33,499.30, and that their total cost to the plaintiff was $32,950.96. He found that the land and building have cost the defendant much more than their market value. The findings indicate that it was bad judgment on the part of the defendant to build such a structure upon the lot, and that the increase in the market value

[18] 202 Mass. 247, 248, 249, 254, 88 N. E. 835 (1909).

of the real estate, by reason of that which the plaintiff put upon it, is only $22,000."

The opinion stated that "In this case there was no express contract. The plaintiff's right is to recover upon an implied contract of an owner to pay for labor and materials used upon his property at his request" and ended as follows:

"The right of recovery depends upon the plaintiff's having furnished property or labor, under circumstances which entitle him to be paid for it, not upon the ultimate benefit to the property of the owner at whose request it was furnished.

"It follows that the plaintiff is entitled to recover the fair value of his labor and materials."

By "implied contract" the court should have meant a contract implied-in-fact, whether it did so or not, for the measure of damages adjudged was the market value of the labor and materials furnished by the plaintiff, *viz.*, $33,499.30, rather than the increase in the market value of the land, *viz.*, $22,000, resulting from the erection of the bath house. The case was not like the cases of rendering personal services in a business or becoming a daughter in the home, where the court, because of the difficulty of proving enrichment, may possibly adopt the rule of thumb of market value of the services, or the estimate placed on the services by the parties themselves, if the express contract fails of enforcement for other than lack of agreement as to compensation, and yet may possibly rationally insist that a quasi-contract rather than an implied-in-fact contract is actually being recognized and enforced.[19] *Vickery*

[19] See Fabian *v.* Wasatch Orchard Co., 41 Utah, 404, 125 Pac. 860 (1912), asserting that where services are performed by the plaintiff under a contract not in writing as required by the Statute of Frauds and the defendant relies on the statute, the reasonable value of the services and not the profit or gain resulting to the defendant should be recovered. The court emphasized the fact that the services were rendered and accepted in performance of a contract. And see Waters *v.* Cline, 121 Ky. 611, 617, 618 (1905), where a niece had rendered her uncle the services of a daughter under a contract not in writing as required by the Statute of Frauds, the oral contract being that in return for her services he was to will her an $8000 farm with $4000 in buildings and stock and give her $5000 to run it. In Kentucky part performance will not take a contract out of the Statute of Frauds, but a supposedly quasi-contract recovery was allowed. The court declared that "in this character of cases the contract measure of the consideration which the defendant has received is the only measure which will approximate justice between the parties. . . . Her presence in their home, with her music, joyousness and dutiful attention, transformed it. Who can measure this in

v. *Ritchie* was a case where there was a clear showing of the actual enrichment and a clear showing of the still greater value of the labor and materials. The selection of the contract implied-in-fact measure of damages necessarily was an assertion that there was an implied-in-fact contract, even though the court may have thought, as some suppose that it did, that it was enforcing a quasi-contractual obligation.[20]

But let us pursue the matter a little further and ask whether, apart from the question of damages, and as a matter of principle, it is not fair to regard *Vickery* v. *Ritchie* as a case of implied-in-fact contract. In the first place, the only thing lacking to an express contract is assent as to the contract price. That "only thing" is of course a very big thing, and error as to it is, from the express contract point of view, essential or fundamental error. Still we know that there are many genuine contracts where the contract price is not agreed upon and where the rule of the reasonable value of the services or property is applied. Some are inclined to call such a genuine contract implied-in-fact, because the big fact of the rate of compensation is implied, but the writer thinks it sounder to call the contract express with an implied-in-fact term, just as we treat contracts which do not fix a definite time for performance as express contracts, although the rule of reasonable time is supplied by the court.[21] However that may be, is it not clear that the situa-

---

dollars and cents? It is presumed that Cline knew what it was worth to him . . . We know of no adequate standard to value the consideration which he enjoyed under the contract, except that he himself fixed."

The reader will notice that the word "possibly" is used in the sentence in the text. The writer does not agree that the courts may adopt in a given case the contract rule of damages because of the inconvenience of making an estimate of enrichment and yet properly insist that a quasi-contract rather than an implied-in-fact contract is being passed upon. If there is, as in the case of Waters *v.* Cline the court thought there was, actual impossibility of making even an approximate guess of value, then there really is no enrichment in the quasi-contract sense and it would seem that an implied-in-fact contract, or something akin to one, is enforced when the express contract measure of damages is applied.

[20] For cases applying a similar rule of damages to that in Vickery *v.* Ritchie to cases of extra work done outside of an express contract, see article by Professor Beale on "The Measure of Recovery upon Implied and Quasi-Contracts," 19 YALE L. J., 609, 620. On pages 620 and 621 Professor Beale emphasizes the difference between the measure of damages upon "a real though unexpressed contract" and the measure upon a quasi-contract.

[21] See 2 ELLIOTT ON CONTRACTS, §§ 1550, 1628. In view of the language used by the courts it is of course arguable whether the implication of a reasonable time for per-

tion in *Vickery* v. *Ritchie* is much the same as such a contract—so much so that, despite the mistake, the contract implied-in-fact theory of the case is the sound one? Of course, in *Vickery* v. *Ritchie* that conclusion was reinforced by the fact that the reason why the work and materials did not add more to the value of the land, *i. e.*, did not enrich defendant more, was that it was poor business judgment on his part to put a Turkish bath establishment on that land; but apart from the justice of making defendant pay for his own poor judgment, if such it was, though he supposed he was to pay only $23,200.00 and though the value added to the land was actually $22,000.00, it is quite arguable that the contract is essentially implied-in-fact. Since there was action by one who intended to charge taken at the request of one who intended to pay—the

---

formance is one of fact or is a condition for performance implied by law. For instance, in Ellis *v.* Thompson, 3 M. & W. 445, 456 (1838), Alderson, B., said: "There is no specification in the contract as to the time when the delivery is to take place, and therefore the law would imply that the delivery should take place within a reasonable time; and it is a question for the jury at the trial, and this was the question put to them, how the reasonable time, which is an implied part of the contract, is to be ascertained." In Ehinger *v.* Baizley Iron Works, 248 Pa. St. 309, 310, 93 Atl. 1074 (1915), Potter, J., said: "It is, however, well settled, that where no time is fixed by the parties for the performance of a contract, the law will fix a reasonable time."

In Liljengren, etc. Co. *v.* Mead, 42 Minn. 420, 424, 44 N. W. 306 (1890), Mitchell, J., said: "Where a contract is silent as to the time of performance, the law implies that it was to be performed within a reasonable time; and, if the contract be in writing, parol evidence of an antecedent or contemporaneous oral agreement is inadmissible to vary the construction to be thus legally implied from the writing itself."

In Smith Sand & Gravel Co. *v.* Corbin, 81 Wash. 494, 497, 142 Pac. 1163 (1914), Ellis, J., said: "It is elementary that if a contract specifies no time, the law implies that it shall be performed within a reasonable time. 9 Cyc. 611. It is also well established that the legal effect of a written contract though not stated in terms in the writing itself, but left to be implied by law, can no more be contradicted, changed or explained by extrinsic evidence, than if the legally implied effect had been expressed in the written terms."

Since the parties must have thought of the time of performance, it would seem as if actual construction — the inference of fact of actual intention — is resorted to when a reasonable time for performance is implied. The correct way of stating the matter would seem to be that of Rogers, Circuit Judge, in Allegheny Valley Brick Co. *v.* C. W. Raymond Co., 219 Fed. 477, 480 (1914), namely: "As no time for performance is specified in either contract the implication is that a reasonable time was intended." If, then, the parol evidence rule prevents a showing that what actually was intended was a specific time, that does not mean that the implication of a reasonable time is one of law rather than of fact, for the parol evidence rule prevents such a showing when the contract expressly provides for performance in a "reasonable time." See Jenkins *v.* Lykes, 19 Fla. 148 (1882); Coon *v.* Spaulding, 47 Mich. 162, 10 N. W. 183 (1881).

elements of an implied-in-fact contract—the assertion that an implied-in-fact contract actually existed, and so the court should have done as it did in applying the implied-in-fact contract measure of damages, is clearly permissible. Indeed, is it not possible that what the court enforced is fairly to be called a meeting-of-the-minds implied-in-fact contract—an imperfect, not a perfect one, to be sure—rather than a no-meeting-of-the-minds implied-in-fact contract? An obligation enforced because the plaintiff did what the defendant requested, under circumstances showing that both parties expected plaintiff to be compensated, and because, for some reason, the express contract intended did not come into existence or is incapable of enforcement, is clearly more consensual than nonconsensual, and if, in its enforcement, the consensual measure of damages is applied, it is clearly to be classed as consensual. The minds of the parties, and their expressions by conduct, meet in large part even if the parties are surprised, and one of them is shocked, to find themselves bound by an implied-in-fact contract when they sought, and mistakenly thought they had, an express contract. While it is perhaps sounder to call it a no-meeting-of-the-minds implied-in-fact contract, it has a meeting-of-the-minds aspect.

It may forestall objection to note here that since the measure of damages applied in a given case shows whether the courts are enforcing a contract or not, one might rest content with reporting the facts without questioning their right to exist. But the writer asks for no such intellectual abnegation. That the contract measure of damages, applied in a given situation where there is no express contract, is the proper measure, must be demonstrated for the existence of an implied-in-fact contract to be approved. The contractual right justifies the measure of damages, not the measure the right. A demonstration that the measure of damages is properly applied in the instances of implied-in-fact-contracts considered in this article cannot be undertaken here, though the nature of that demonstration is foreshadowed in the foregoing discussion of *Vickery* v. *Ritchie*.

Take, for another instance of an implied-in-fact contract not generally recognized as such, the case of *Turner & Otis* v. *Webster*.[22] There the express contract failed because of ambiguity, the plain-

[22] 24 Kan. 38 (1880).

tiff thinking he had offered to take three dollars for watching for a twenty-four hour day certain attached property and the attaching creditors thinking the offer was of one dollar and a half for such a day. The court emphasized the fact that defendants employed plaintiff to do the very work that he did and knew that he did it, and, while it said that there was no express contract to enforce, declared that "Justice is done to all parties by ignoring any promise or understanding as to compensation and giving to the laborer reasonable compensation for the work done, and requiring the party receiving the benefit of such work to pay a just and reasonable price therefor." Justice is done by emphasizing that everything actually performed took place in a full meeting of minds with only the matter of pay undetermined and by concluding, in effect, that an implied-in-fact contract existed. The parties *meant* to have an express contract; they got one implied-in-fact and, perhaps, though that is arguable, it is fairly to be called a meeting-of-the-minds implied-in-fact contract.

The implied-in-fact contract principle is exemplified in other situations. Take the case of "snapping up" too low an offer or bid knowing that the offeror has made a mistake and then, after getting performance, insisting on paying the erroneously offered low price. Even if it be thought that there cannot properly be said to be even an imperfect meeting-of-the-minds implied-in-fact contract in such a case, why is it not a situation calling for the finding and enforcement of a no-meeting-of-the-minds implied-in-fact contract? The thing done is done at request, is the very thing attempted to be contracted about, payment for it is contemplated — all these are tests of implied-in-fact contracts — and, if defendant is to be denied his unfair advantage under the express contract, clearly the implied-in-fact contract measure of damages is the sound one to apply.[23] The plaintiff should not be compelled to show defendant's enrichment and should recover even if defendant was not enriched.

---

[23] It was applied in Tyra *v.* Cheney, 129 Minn. 428, 152 N. W. 835 (1915). Compare San Francisco Bridge Co. *v.* Dumbarton Land & Imp. Co., 119 Cal. 272, 51 Pac. 335 (1897). "He who rescinds a contract — which the defendant does by rendering its performance impossible — must re-establish the other party in his *status quo*." Dodge, J., in George M. Newhall Engineering Co. Ltd. *v.* Daly, 116 Wis. 256, 263, 93 N. W. 12 (1903). That is the contract measure of damages, *viz.* to make the plaintiff whole. The quasi-contract measure is directed at keeping the defendant from being unjustly enriched.

The Statute of Frauds has produced a situation which has led at least one court to enforce an implied-in-fact contract. The Statute of Frauds cases have been mentioned in note 19, *ante*, but a more detailed statement of *Fabian* v. *Wasatch Orchard Co.*[24] should be made. The plaintiff was a merchandise broker who had rendered services for the defendant in advertising defendant's products and soliciting and obtaining orders for the same. The contract provided for brokerage charges by the plaintiff, but, since it was not to be performed within one year and was not in writing, it was unenforceable under the Statute of Frauds. The defendant insisted that the orders for defendant's goods obtained by plaintiff were at prices less than the cost of manufacture and hence the defendant was not enriched, but instead was the loser, by plaintiff's services. The trial court gave plaintiff a judgment for the reasonable value of the services which had been rendered by the plaintiff and had been received and accepted by the defendant. This judgment the Supreme Court affirmed, saying:

"We think the well-established rule is that, where one who, not in default, on faith of and in accordance with a contract unenforceable because within the statute of frauds, but not *malum prohibitum* nor *malum in se*, has, in pursuance of the contract, rendered services for the adversary party, who, with knowledge or acquiescence, accepted them and received the benefit of them and repudiated the contract, he may recover on a *quantum meruit* the reasonable value thereof — not the profit or gain resulting to the adversary party by reason of the transaction, nor the loss suffered or sustained by the other, but compensation for the reasonable value of the services rendered by the one and accepted and received by the other." [25]

It is significant that the first case cited by the court for that statement is *Vickery* v. *Ritchie*, *supra*, which of course is not a Statute of Frauds decision, but which is, as we have seen, an im-

[24] 41 Utah, 404, 410, 125 Pac. 860 (1912). Compare Stout's Adm'r *v.* Royston, 32 Ky. L. Rep. 1055, 107 S. W. 784 (1908). But see Boone *v.* Coe, 153 Ky. 233, 154 S.W. 900 (1913).

[25] It is not often where services are performed at request with the expectation of both parties that the services will be paid for that the court is asked to inquire into whether the services actually did enrich the defendant. For a case where the inquiry showed that there was enrichment, see The Olympia, 181 Fed. 187 (1909). We are not interested here in ascertaining whether under the facts of the case there should have been a recovery. The case is adversely criticized in 24 HARV. L. REV. 408.

For an implied-in-fact contract case where the court seemingly unnecessarily demonstrated actual enrichment of defendant by plaintiff's services, see Wojahn *v.* Nat'l Union Bank, 144 Wis. 646, 129 N. W. 1068 (1911).

plied-in-fact contract decision. Whether it is not a violation of the Statute of Frauds to enforce an implied-in-fact contract, instead of a quasi-contract, may be arguable, but that the Utah court did enforce an implied-in-fact contract, and probably a meeting-of-the-minds implied-in-fact contract, would seem to be clear.[26]

Another situation presenting a similar problem arises out of impossibility of performance of contracts. In *Moore* v. *Robinson*,[27] the defendant, a lawyer, had been paid $600 in cash and been given a note for $400 under a contract to defend and secure the acquittal of the plaintiff's brother, who was then under indictment for possessing and passing counterfeit money. The defendant's contract, made in January, provided that he should secure the acquittal and

[26] Here, again, most courts will fail to see that it is the implied-in-fact contract, rather than the express contract, for which enforcement is asked. For an instance, see Boone *v.* Coe, 153 Ky. 233, 154 S. W. 900 (1913), where, in overruling an earlier Kentucky case, McDaniel *v.* Hutcherson, 136 Ky. 412, 124 S. W. 384 (1910), which had allowed a plaintiff who suffered loss by defendant's refusal to perform to recover, although the defendant was not enriched thereby, the court said (p. 239): "The statute says that the contract of defendant made with plaintiffs is unenforceable. Defendant, therefore, had the legal right to decline to carry it out. To require him to pay plaintiffs for losses and expenses incurred on the faith of the contract without any benefit accruing to him would, in effect, uphold a contract upon which the statute expressly declares no action shall be brought. The statute was enacted for the purpose of preventing frauds and perjuries. That it is a valuable statute is shown by the fact that similar statutes are in force in practically all, if not all, of the states of the Union. Being a valuable statute the purpose of the law-makers in its enactment should not be defeated by permitting recoveries in cases to which its provisions were intended to apply." No doubt there can be no recovery on the express contract, but is it inconsistent with the purpose of the statute to enforce an implied-in-fact contract? Perhaps, and even probably, but the court did not consciously face that question.

It may be asked why an implied-in-fact contract is not enforced in cases like Dowling *v.* McKenney, 124 Mass. 478 (1878); Banker *v.* Hendersen, 58 N. J. L. 26, 32 Atl. 700 (1895), where the labor of the plaintiff was expended on his own property, which he was to turn over in its finished form to the defendant under the oral contract, and he was denied any recovery. See Boone *v.* Coe, 153 Ky. 233, 154 S. W. 900 (1913). The real question, however, is whether it is ever allowable to enforce an implied-in-fact contract where the express contract is not in writing, as required by the Statute of Frauds. If it is not, then clearly Dowling *v.* McKenney and Banker *v.* Henderson are sound decisions, for the defendant was in no way enriched by plaintiff's labor on plaintiff's own property, however damaged plaintiff may have been, so no quasi-contract existed. On the other hand, if an implied-in-fact contract is to be enforced in any of these Statute of Frauds cases — and Fabian *v.* Wasatch Orchard Co., *supra*, necessarily asserts that one is — then maybe we should revise our estimate of such decisions as Dowling *v.* McKenney and Banker *v.* Henderson. The question is more complicated than the one raised in Vickery *v.* Ritchie, for the spirit and the letter of the Statute of Frauds are difficulties in the way of enforcing an implied-in-fact contract.

[27] 92 Ill. 491 (1879).

complete release of the plaintiff's brother from said charge and that the brother should be set at full liberty at the next June term of court, and it was "specially" agreed that, if the plaintiff's brother should not be released by July 1, the time when the note was payable, the defendant would pay back to plaintiff the $600 and deliver to him the $400 note. Without the fault of either plaintiff or defendant, the plaintiff's brother did not appear for trial at the June term or any term, and was not tried upon nor released from the charge against him. The court said that since, under the contract, the defendant was to retain the money and the note only upon the happening of the legal acquittal of plaintiff's brother upon a trial, the defendant must refund, but that

"what appellee [the defendant] in good faith did, pursuant to the terms of the agreement, before ascertaining that its performance had become impossible, he is entitled to compensation for, and this should be deducted from the $600. The balance appellant [the plaintiff] is entitled to have judgment for."

The court did not consider whether the contract was illegal and did not give any reason for allowing a deduction from plaintiff's contract of the reasonable value of defendant's services. Manifestly that deduction was not allowable on any orthodox quasi-contract basis, since plaintiff was not enriched by the services, which were rendered in behalf of plaintiff's brother. The deduction can be supported, if at all, only on the theory that the services of the defendant were rendered at the plaintiff's request, with an intent that the plaintiff should pay for them, and that, although the particular purpose of the express contract was frustrated by impossibility, "equally a surprise to both" parties, occasioned by the act of the plaintiff's brother, that frustration, while giving plaintiff certain express contract rights, also made it fair for the court to give the defendant what was in effect a set-off or counter-claim on an implied-in-fact contract.[28]

[28] For the purpose of this article, it is immaterial whether Moore *v.* Robinson, *supra*, is wholly consistent with Siegel Cooper & Co. *v.* Eaton & Prince Co., 165 Ill. 550, 46 N. E. 449 (1897), and Huyett & Smith Manufacturing Co. *v.* The Chicago Edison Co., 167 Ill. 233, 47 N. E. 384 (1897), which hold that there can be no recovery on a *quantum meruit* or otherwise for a part performance of an entire contract. They are, after all, minority decisions in the United States as to the effect of impossibility on contracts. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 537, note 21.

Other illustrations of the sound possibilities of the novel explanation of court action here advanced might be given, but this article does not purport to exhaust the authorities, nor even to mention many of them, and does not pretend to canvass all possible situations, so probably it is wise to consider, in closing, only the light which the foregoing explanation throws on the interesting question of whether, where a plaintiff is given the alternative of suing a defendant in wilful default under an express contract either for the normal express contract measure of damages or for some special measure of damages, his choice is between an express contract remedy and a quasi-contractual one, or whether it is merely between alternative remedies on the contract. As Professor Woodward has pointed out,[29] the question is whether the only primary obligation is the obligation to perform the express contract and hence the only primary right the right to such performance. There *may* be several primary rights, one to the performance agreed, another to performance under an implied-in-fact contract to pay reasonable compensation for what is done at request if later there is repudiation by the defendant, regardless of whether the defendant is actually enriched, and still another to have the defendant hand over to plaintiff any enrichment secured by defendant at plaintiff's expense through the performance. Again, the measure of damages helps us to a conclusion. In some cases, at least, it seems clear that the implied-in-fact theory is necessarily adopted, because the recovery is not at the express contract rate and is not reduced to the amount of defendant's enrichment.[30] If there is an implied-in-fact contract primary right, the fact, if it be a fact, that it comes into existence at the time of the repudiation of the express contract, need not make it an alternative right on or under that express contract, and the same thing is true of a quasi-contractual right if one exists and if

[29] WOODWARD, QUASI CONTRACTS, § 260.

[30] See 13 C. J. 694. "But where, as in this case, the plaintiffs are prevented from performing the contract, they are entitled to recover, if at all, what their work and labor is worth, whether it was of value to the defendant or not." Cahill, J., in Mooney *v.* York Iron Co., 82 Mich. 263, 265, 46 N. W. 396 (1890), quoted with seeming approval in Jenson *v.* Lee, 67 Kan. 539, 73 Pac. 72 (1903).

" . . . but, where the party suing is not responsible for the breach, neither the right nor the amount of the recovery depends upon the measure of benefit received by the party guilty of the breach." McGrath, J., in Hemminger *v.* Western Assurance Co., 95 Mich. 355, 358, 54 N. W. 949 (1893). See note 23, *supra*.

it is more worth while for the plaintiff to base his action on it. It would seem as if there are three primary rights and not merely one, though they may date from different times. It is quite as easy to say that as to say that there is only one primary right — that on the contract — with several remedial rights.[31] In any event, in Michigan, in view of the cases cited in note 30, there would clearly seem to be at least two primary contract rights, one on the express contract and one on the implied-in-fact contract, with the plaintiff compelled to elect which he will enforce.

In order that it may not be forgotten that the law of trusts presents a problem on all fours with this, the writer wishes to repeat what he wrote several years ago in a book review discussion of the implied-in-fact contract problem, namely:

"Perhaps an illustration from another subject will make clearer the point here attempted to be stated. Take the so called case of a resulting trust in land, where the grantee makes an oral promise to hold in trust. A pays the purchase price for land to B, the grantor, and has the title conveyed to C in fee, C not being related to A, and the conveyance being made to C on C's oral promise to hold in trust for A. In the absence of the statute of frauds, a court of chancery would say: 'This is an express trust and will be enforced as such.' But the English statute

[31] The fact that the right to recover the amount of defendant's unjust enrichment arises because the plaintiff's expectation that the defendant would perform in full under the contract has been disappointed, does not seem enough to brand the right as contractually remedial. The reasons of circumstance which cause quasi-contractual rights to arise have nothing to do with their nature as rights. Both contract and non-contract situations may result in redressable unjust enrichment, and the nature of the obligation enforced is the same no matter which kind of situation gives it rise. The only satisfactory way to distinguish a quasi-contractual obligation from a contractual, now that both the form of the action and the lack of a meeting of the minds of the parties leave us in doubt, is by the rule of damages applicable in the given case. If, as in this case of a choice of remedies for repudiation of an express contract, the measure of damages where the one remedy is pursued is contractual and where the other is pursued is quasi-contractual, there would seem to be no profit in talking of the right vindicated by the quasi-contractual damage recovery as a remedial contract right. In England the express contract's repudiation, and in the United States either that contract's repudiation or its substantial breach, would seem to be but a circumstance precedent to the coming into existence of the quasi-contractual primary right. The breach of contract but discloses the fact that defendant has been unjustly enriched through plaintiff's performance, and, while such breach is the occasion of the quasi-contractual right arising, the remedy is not on that account one on the contract. So, too, if a true analysis of the situation discloses behind the express contract an implied-in-fact contract, the remedy on it is not one on the express contract, but, instead, we have still a third primary right to enforce.

of frauds provided, and the American statutes have similar provisions, that trusts of land not 'manifested and proved' by writing, signed by the proper party, or by such party's will, shall be 'of none effect,' and because of that statute, the express oral trust cannot be enforced. That, however, does not preclude action by chancery, for in the absence of the express oral trust and of any evidence of a gift as intended, chancery would have indulged the presumption of fact of a trust relationship between C and A, and even the presence of the express oral trust, since that express oral trust is unenforcible, will not prevent the same presumption. At any rate, that is the judicial way of regarding the matter, even though it may be somewhat artificial. Such a presumed trust is an implied in fact trust, since the presumption is rebuttable, and it can and will be enforced because the English statute of frauds, which made 'of none effect' express oral trusts, and the American statutes modeled on it, dispensed with the necessity of a writing 'where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law,' and because this kind of resulting trust is deemed to be covered by that language. Back of the express oral trust is held to be that implied in fact trust ready to take effect if and when the express oral trust cannot. (*Robinson* v. *Leflore*, 59 Miss. 148. See *Brennaman* v. *Schell*, 212 Ill. 356.) The implied in fact resulting trust is not the same as the express oral trust, although it may be treated like an express trust so far as the application of the statute of limitations is concerned. (*Lufkin* v. *Jakeman*, 188 Mass. 528. See *Whetsler* v. *Sprague*, 224 Ill. 461.) Now, suppose for some reason — say a statute enacting that the payer of the purchase money shall not enforce a resulting trust — this implied in fact resulting trust also must be ignored. Then a constructive trust for the payer of the money, the oral *cestui* defrauded by a retention of the property by C, should be enforced if C acquired the title with an intent not to perform, and also — though in view of the statute against resulting trusts supposed this next statement is arguable on principle as well as on the authorities — if C acquired title with honest intent, but in addition to refusing to perform the oral trust, has appropriated to his own use the trust *res*. Thus it has been held that back of the express oral trust, and ready to take its place when a failure of justice would otherwise occur, was and is the implied in fact resulting trust, and it seems that back of that, ready for the emergency caused by the statutory interference with the resulting trust, was and is the implied by law constructive trust.[32] In a similar way it may yet be held expressly that

[32] On the general trust problem see Stone, "Resulting Trusts and the Statute of Frauds," 6 COL. L. REV. 326; Costigan, "Trusts Based on Oral Promises to Hold in

back of an attempted but imperfect express contract, or of an express oral contract unenforcible because of the statute of frauds, there is an implied in fact contract to pay the reasonable value of services rendered or materials furnished, regardless of enrichment or loss, and that back of the implied in fact contract, in reserve in case something makes that implied in fact contract unenforcible, lies the obligation implied in law on the ground of unjust enrichment known as the quasi-contract.[33] The courts have paved the way for that very view.

"To recapitulate, there would seem to be at least two kinds of anomalous contracts, namely: 1. Those which under the sensible and efficient 'rules of the game' of making contracts are recognized and enforced as contracts despite the lack of a genuine meeting of minds; and 2. Those which are implied in fact because the attempt of the parties to form an express contract proves ineffectual, because they learn of their failure to enter into an express contract only after they have gone so far with performance that the *status quo* cannot be restored and because the rule for measuring damages which is to be applied if the contract implied in fact view is adopted is the just rule for the case. No one has yet advocated that the first kind of anomalous contracts should be dealt with apart from other contracts; and, on the other hand, hardly anybody has yet come to realize that the second kind exists, for the second kind is still regarded as a quasi contract to which justice requires that a contract measure of damages shall be applied."[34]

And now, perhaps we may venture to consolidate our gains. It was conceded at the start that Professor Williston is absolutely right in his contention that the no-meeting-of-the-minds express contracts — the objective but not subjective test contracts — are properly to be denominated contracts instead of quasi-contracts, and the reason for that concession was that on their breach the normal contract measure of damages is applied. But that same reason has led us to the further conclusion that there are genuine implied-in-fact contracts of both the meeting-of-the-minds and the

---

Trust, to Convey, or to Devise, Made by Voluntary Grantees," 12 MICH. L. REV. 423, 515.

[33] Compare National Granite Bank *v.* Tyndale, 176 Mass. 547, 57 N. E. 1022 (1900), where a married woman who had avoided her notes because made payable to her husband's order and indorsed by him was held liable on the original debt created by the loan to her. That original contract obligation was back of the notes ready to take their place in the emergency which arose.

[34] From a book review in 8 ILL. L. REV. 68, 73, 74. That material in a book review is practically buried is the excuse for printing it here.

no-meeting-of-the-minds varieties.[35] That conclusion is quite unorthodox and doubtless will draw protests both from writers on contracts and from writers on quasi-contracts; but there it is. Mere protests will not avail against a *prima facie* case made out by the aid of the law of damages. Perhaps the protests will be more against the use of the phrase implied-in-fact than against the idea here covered by the phrase. If so, the protests may quickly be eliminated by the adoption of a new name. The phrase implied-

[35] The enlarged view of implied-in-fact contracts here advocated may lead to greater charity in the consideration of what have been deemed strictly express contract cases. The case of Wheeler *v.* Klaholt, 178 Mass. 141, 59 N. E. 756 (1901), for instance, has offered serious difficulty from the express contract point of view. There the express offer was to sell for "net spot cash at once" shoes which belonged to the offeror but by mutual mistake of the parties were in the possession of the offeree, the offer specifying that the offeree should return the goods "immediately" or "at once" if the offer was not accepted. Though net spot cash was not forthcoming, the court held that the jury could find from the silence of the offeree, and his failure to return the shoes for about a month, the previous relations of the parties calling for speech, an acceptance of an offer to sell, with payment, presumably, to be due at once without demand. That would seem to be binding the parties by a contract different from that contemplated by the express offer, but it may perhaps be an instance of a no-meeting-of-the-minds implied-in-fact contract, the conduct of the offeror being such that it must receive the interpretation "Unless you send the cash or else in a reasonable time return the goods, you will be deemed to buy them and we shall hold you for the price," and the offeree's silence and failure to return the goods in a reasonable time having the significance which the jury may see fit to attach to it. It is not intended here to defend the decision, but merely to suggest that as an implied-in-fact contract decision it is understandable, though as merely an express contract decision it is incapable of comprehension, let alone of support. The recognition of merely objective test implied-in-fact contracts throws the light of understanding on many otherwise dark decisions, even if it does not lead to sympathetic appreciation of them. It may even supply the proper solution of the troublesome problem of what shall be the effect of an attempted revocation of an offer of unilateral contract where the notice of revocation comes after the offeree has started to accept and while he is still continuing to perform the acts of acceptance. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 34, note 39; McGovney, "Irrevocable Offers," 27 HARV. L. REV. 644, 654–663; Wormser, "The True Conception of Unilateral Contracts," 26 YALE L. J. 136; Corbin, "Offer and Acceptance and Some of the Resulting Legal Relations," 26 YALE L. J. 169, 195–196. The case of an attempted revocation of an offer to an indefinite number of persons by advertisement in the newspapers is, perhaps, one which must be handled, as Sir Frederick Pollock says it was in Shuey *v.* United States, 92 U. S. 73 (1875) by judicial legislation (WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 23), but the case of an offer to a known person or to known persons might well be disposed of, without violation of principle, by permitting the offer of unilateral contract to be revoked prior to substantially complete performance of the acts called for and yet preventing real hardship to the offeree, in cases where an adequate quasi-contractual obligation cannot be found, by enforcing an implied-in-fact contract to compensate the offeree for what he has done for the offeror at the latter's request.

in-fact is used in this article because, so far, we have names for only two kinds of actual contracts, namely, express contracts and implied-in-fact contracts. If the name implied-in-fact will not serve to cover tacit no-meeting-of-the-minds contracts, our merely objective test implied-in-fact contracts — what the writer would prefer to call constructive implied-in-fact contracts[36] — by all means let us have a new name that will satisfy;[37] but for want of an accurate name we must not class as quasi-contracts those obligations which the measure of damages properly applied for their breach demonstrates to be genuinely contractual, even though the courts do constantly refer to them as implied by law.

George P. Costigan, Jr.

NORTHWESTERN UNIVERSITY.

[36] See note 9, *supra*.

[37] Occasionally an attempt is made to place under quasi-contracts not only what are here called no-meeting-of-the-minds implied-in-fact contracts, but also some of the meeting-of-the-minds implied-in-fact contracts, by changing the definition of quasi-contracts. See WOODWARD, QUASI CONTRACTS, §§ 7, 8, which substitutes the word "benefit" for "enrichment." Compare Corbin, "Quasi Contractual Obligations," 21 YALE L. J. 533, 550, where the words "either specifically" may possibly serve the same purpose. But that method of handling the difficulty leaves to the whims of individual judges the application of one measure of damages or the other. To say to a judge, for instance, that he may shift from "benefit" to "enrichment" or *vice versa*, as his mood may suggest, is dangerous. The measure of damages applied in a given situation should be a reasoned consequence of the real nature of the primary right. While it is in the main the argument of this paper that the courts are misnaming certain obligations by calling them quasi-contractual when they are really implied-in-fact, as the measure of damages shows, that argument, which might otherwise be deemed a placing of the cart before the horse, is based on the fundamental assumption that the proper measure of damages actually is applied in the instances cited and to be supported. The measure adopted in Vickery *v.* Ritchie was proper because the real nature of the primary right, as our discussion of the case shows, was contractual. The main point made in this paper is that a contractual measure of damages can be defended only if there is in fact a contract, and, accordingly, wherever a contractual measure of damages properly is allowed, a contractual primary right is recognized and enforced. Nothing will be gained and much confusion of thought will result if the definition of quasi-contracts is broadened to cover some implied-in-fact contracts. It would seem to be much better to revise the old definition of implied-in-fact contracts, or else to identify and name a third class of genuine contracts, and then to apply to a given situation that measure of damages, contractual or quasi-contractual, which sound legal reasoning, rather than erratic impulse, indicates to be proper. We shall get right results only if we have an accurate scientific classification.